

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned On Briefs June 12, 2009

BARRY JACKSON HAYES v. PATSY ANN JENKINS HAYES

Direct Appeal from the Chancery Court for Dekalb County
No. 2007-083 Ronald Thurman, Chancellor

No. M2008-02007-COA-R3-CV - Filed June 29, 2009

This is a divorce case. Husband appeals the trial court's award of alimony *in futuro* to Wife. Wife appeals the order requiring her to be responsible for one half of any debt owing on commercial property after it is sold. Finding no error, we affirm.

Tenn. R. App. P.3. Appeal as of Right; Judgment of the Chancery Court Affirmed

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT JR., J., joined.

Robert W. Newman, McMinnville, Tennessee, for the Appellant, Barry Jackson Hayes.

Sue N. Puckett-Jernigan, Smithville, Tennessee, for the Appellee, Patsy Ann Jenkins Hayes.

OPINION

Barry Jackson Hayes ("Husband") and Patsy Ann Jenkins Hayes ("Wife") were married on August 21, 1999. No children were born to the marriage. On July 17, 2007, Husband filed a complaint for divorce in the Chancery Court for DeKalb County alleging inappropriate marital conduct on the part of Wife. On September 21, 2007, Wife answered the complaint, denying the material allegations contained therein and filed a counter-complaint for divorce alleging inappropriate marital conduct by Husband. In her counter-complaint, Wife asks the court to award alimony asserting that she is disabled.

An agreed order on temporary support was entered on November 13, 2007, wherein Husband was ordered to provide a vehicle for Wife's use, and to pay \$200 per week in alimony *pendente lite*. On December 4, 2007, Wife filed a petition for contempt against Husband, alleging that he had violated the court's order by failing to provide a vehicle, and that he was also \$400 in arrears on his support payments. In response, Husband filed a motion on December 14, 2007 asking the court to discontinue the support obligation due to his alleged inability to pay. On January 11, 2008, the court

found Husband in contempt, ordered him to comply with the previous order, and ordered him to pay the arrears owed to Wife.

The cross-complaints for divorce were heard on June 20, 2008. The parties were granted a divorce by Order of August 8, 2008. Concerning alimony, the trial court held as follows:

The defendant/counter-plaintiff/wife, Patsy Ann Jenkins Hayes, is awarded alimony *in solido* in the amount of Ten Thousand Dollars (\$10,000.00), from which she will pay her own attorney's fees, and is awarded alimony *in futuro* in the amount of One Thousand Dollars (\$1,000) per month as opposed to transitional alimony based upon the following factors:

- a. There is a need for alimony.
- b. The husband has a greater earning capacity than the wife.
- c. The wife's standard of living did improve during the marriage and [she] had a higher standard of living as a result of the marriage.
- d. There is fault on the part of the husband due to his excessive drinking and abuse.
- e. The husband was not as credible a witness as the wife.
- f. The husband has considerable separate property, whereas, the wife has no separate property other than the personal property.

Husband appeals the award of alimony in this case and raises one issue for review as stated in his brief:

Whether the trial court abused its discretion in awarding spousal support of alimony *in futuro* based on its conclusion that obligee spouse was in need and disregarding obligor spouse's lack of ability to pay.

Wife appeals the trial court's order requiring her to be responsible for one half of any debt owing on the commercial property after it is sold.

Tennessee law recognizes several types of spousal support: alimony *in futuro*, alimony *in solido*, rehabilitative spousal support, and transitional spousal support. Tenn.Code Ann. § 36-5-121; **Riggs v. Riggs**, 250 S.W.3d 453, 456 (Tenn.Ct.App.2007). Tenn.Code Ann. § 36-5-121(d)(2) indicates a statutory preference for rehabilitative alimony over more long term forms of spousal

support. *Riggs*, 250 S.W.3d at 456. The “propriety of awarding alimony as well as the adequacy of the amount awarded depends upon the unique facts of each case.” *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn.Ct.App.1997). “The role of an appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable. Thus, this Court gives awards of alimony an abuse of discretion review.” *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn.2006) (citation omitted). This standard requires us to consider (1) whether the decision has a sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. *See BIF v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *2 (Tenn.Ct.App. July 13, 1988). While we will set aside a discretionary decision if it rests on an inadequate evidentiary foundation or if it is contrary to the governing law, we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative. *State Ex Rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn.Ct.App.2000). Furthermore, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trier of fact, who has the opportunity to observe the witnesses in their manner and demeanor while testifying, is in a far better position than this Court to decide those issues. *See McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn.Ct.App.1997). The weight, faith, and credit to be given to any witness' testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *See id.*; *In re Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn.1997).

Tenn.Code Ann. § 36-5-121 lists the relevant factors for a court to consider when deciding whether the payment of alimony is appropriate:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;

- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn.Code Ann. § 36-5-121(i)(1)-(12). Among these factors, “the two that are considered the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay.” *Riggs*, 250 S.W.3d at 457 (citing *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn.2002)).

At the time of the hearing in this case, Husband was 63 years old, and Wife was 64. Both parties have experienced significant health problems. At the time of trial, Husband was in remission from bladder cancer. Wife was on disability at the time of the marriage. She suffers from knee and heart problems. It appears from the record that, despite his previous cancer diagnosis, Husband is able to live a relatively normal life. Specifically, he is able to work.

Husband is in the landscaping business. He testified that his business is down almost 80% since the recent economic downturn. However, during his testimony, Husband appeared evasive about exactly how much business he had been able to maintain, as well as exactly how many side jobs he had been able to pick up. Husband admitted in his testimony that he deals mainly in cash. There is an inference in the record that Husband may not be fully reporting his total income. At any rate, the trial court made a specific finding that, “the Husband was not as credible a witness as the Wife.”

What the record does reveal is that Husband is able to earn a decent living. Not only does he have a landscaping business that still produces an income stream, but he also has a contractor's license. Although the license is currently retired, Husband testified that it could be reactivated. Based upon his construction experience, Husband is able to pick up odd construction jobs around the community. Moreover, Husband came into the marriage with separate property, including at least two lots, and a family farm on which two houses are located. The record does not clearly reflect the value of these properties, including the improvements made thereon. However, there is proof in the record that the double-wide trailer on the farm received significant upgrades during the marriage, which increased the value of this property. Because Husband keeps the farm as his separate property, any appreciation remains his. Suffice it to say that Husband is leaving the marriage with more assets than Wife.

Concerning Wife's ability to support herself, the record indicates that she suffers from knee problems so severe that she has qualified for knee replacement surgery. She is also in need of

extensive dental work, which she is unable to afford. Because of the risk of infection, her doctor has declined to do the knee surgery until Wife's dental problems are addressed. Wife is currently unable to work, and even if Wife were to have the knee surgery, she has other medical conditions that would hinder her ability to earn a living. Despite her health problems, the record indicates that Wife helped out with the house and the farm as she was able.

During her testimony, Wife stated that Husband has a drinking problem, which he does not deny. The evidence suggests that Husband was mentally and (as the pictures in record suggest) physically abusive to Wife, especially when he was drinking.

Concerning Wife's assets, she came into the marriage with no substantial separate property. Although she testified that she received a \$35,000 judgment for injuries received in an automobile accident, the undisputed testimony is that the majority of these funds were spent on medical bills, and attorney's fees. At any rate, there is no indication in the record that Wife has any significant savings or assets on which to rely for support. At present, she receives approximately \$700 in disability payments per month, which make up her total income.

From the totality of the circumstances, it is clear that Wife is in need of alimony, and that, based upon her health problems and her age, she will be in need of future support. In contrast to Wife, Husband is currently healthy enough to work, and he has been able to earn a decent living through landscaping and construction jobs. He also has a contractor's license, which could provide another avenue of income for him. Accordingly, we are unable to conclude that the trial court committed error in its award of alimony *in futuro* to Wife.

The trial court also divided the marital debt between the parties. This includes a debt owed on a commercial property that was purchased during the marriage. On appeal, Wife has asked this Court to reverse the court's division of this particular debt, and to relieve her from any responsibility on the commercial property. We have reviewed the record and the equities between the parties. We are unable to conclude that the trial court erred in its division of this debt, especially in light of our finding on the alimony award.

For the foregoing reasons, we affirm the order of the trial court. Costs of this appeal are assessed against the Appellant, Barry Jackson Hayes, and his surety.

J. STEVEN STAFFORD, J.